

JUL 28 2006

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

**CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS**

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DAVID HERNANDEZ-TOSCANO,

Defendant - Appellant.

No. 05-10228

D.C. No. CR-04-00020-DWH

MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
David Warner Hagen, District Judge, Presiding

Submitted July 24, 2006**

Before: ALARCÓN, HAWKINS, and THOMAS, Circuit Judges.

David Hernandez-Toscano appeals from the 77-month sentence imposed after his guilty-plea conviction for one count of illegal entry, in violation of 8 U.S.C. § 1326. We have jurisdiction under 28 U.S.C. § 1291.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

The district court did not err in applying an enhancement pursuant to 8 U.S.C. § 1326(b)(2) based on Hernandez-Toscano's prior felony drug trafficking conviction. The fact of a prior conviction does not need to be admitted by the defendant or proven to a jury beyond a reasonable doubt for purposes of sentencing. *See United States v. Booker*, 543 U.S. 220, 244 (2005); *United States v. Weiland*, 420 F.3d 1062, 1080 n.16 (9th Cir. 2005) (noting the continuing vitality of *Almendarez-Torres v. United States*, 523 U.S. 224, 247 (1998)).

Hernandez-Toscano also contends that the district court failed to consider the sentencing factors enumerated in 18 U.S.C. § 3553(a). The facts belie Hernandez-Toscano's contention, as the district court properly addressed his criminal history in considering the need to protect the public and to afford adequate deterrence to further criminal conduct. *See* 18 U.S.C. § 3553(a)(2)(B), (D). The district court was not required to consider potential disparities between Hernandez-Toscano's sentence and those for defendants sentenced under a fast-track program. *See United States v. Marcial-Santiago*, 447 F.3d 715, 717-18 (9th Cir. 2006). Because the court considered various pertinent factors listed in § 3553(a), the sentence imposed was not unreasonable. *See United States v. Plouffe*, 436 F.3d 1062, 1063 (9th Cir. 2006).

AFFIRMED.